NO. 81-2164

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DONALD BORDENKIRCHER,
SUPERINTENDANT, WEST VIRGINIA
STATE PENITENTIARY,

PETITIONER,

v.

JINKS ADKINS, JR.,

RESPONDENT

ON WRIT OF CETIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUMMARY OF ARGUMENT

The portion of the decision below of which petitioner seeks review is in accordance with the body of law which prohibits the State from shifting the burden of persuasion to the criminal defendant with regard to any essential element of the crime charged. The respondent ignores the presumption of innocence in arguing that requiring the defendant to "create" a reasonable doubt of guilt is equivalent to requiring the State to prove guilt beyond a reasonable doubt. Accordingly, there is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

THE STATE'S ALIBI INSTRUCTION SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF THE UNITED STATES CONSTITUTION

As noted by the United States Court of Appeals for the Fourth Circuit in its opinion below, it is well established by this Court's rulings in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 442 L.Ed.2d 508 (1975) and In re Winship, 397 U.S. 358, 905 S.Ct. 1068, 25 L.Ed.2d 368 (1970) "that the prosecution must prove every element of a criminal charge beyond a reasonable doubt."

Before both the District Court and the Court of Appeals, the respondent contended that the State could shift the burden to the criminal defendant by characterizing alibi as an affirmative defense and thereby bring its instruction within the scope of Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

The Fourth Circuit noted that whether the alibi defense meets the criteria announced in Patterson for an affirmative defense is a question of Federal law and ruled that the State's contention that the Fourth Circuit was bound by the

West Virginia court's characterization of the alibi defense was meritless. The Fourth Circuit specifically recognized that an alibi "negates every fact necessary to prove a breaking and entering" and accordingly held that, "When viewed under the Patterson standard, the West Virginia court's characterization of the alibi as an affirmative defense must be rejected." 674 F.2d 279, 282.

The State has apparently abandoned its attempt to justify a shifting of the burden to the defendant, and is now contending that there is no shifting of a burden:

> ". . . your petitioner believes that whether alibi is an affirmative defense is a tantalizing irrelevancy which has confused the issues in this case. Your petitioner does not deny that presence is an essential element in many crimes, nor that it should be proven in such beyond a reasonable doubt. What it does deny is that the instruction at issue imposes any more 'burden' on the defendant than if he had done nothing." Petitioner's Petition for Writ of Certiorari, at 14-15.

The State bases its argument on the erroneous proposition that requiring the defendant to "create a reasonable doubt" is the same as requiring the State to prove guilt "beyond a reasonable doubt."

> "Since 'reasonable doubt' is the exact converse of 'beyond a reasonable doubt,' it follows that the State is by no means relieved of its burden under Mullaney and Winship, supra, and that the defendant is saddled with no greater 'burden' than he always bears to win an acquittal: To have a reasonable doubt in the mind of the jury." Petitioner's Petition for Writ of Certiorari, at 16.

The State's argument distorts and ignores the fundamental foundation of our American system of criminal justice, i.e. the presumption of innocence of the accused. Our system does not require that the accused "create" a doubt of

his innocence, but rather requires that the State prove guilt beyond a reasonable doubt. The relationship between the "beyond a reasonable doubt standard and the presumption of innocence was clearly recognized in In Re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970):

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' Coffin v. United States, Supra, at 453." 317 U.S. 358, 363.

The presumption of innocence not only affects those situations where there is no proof, but it is also embodied in the requirement that the State prove guilt beyond a reasonable doubt. In the continuem of possible degrees of proof is a hypothetical point at which the mind of the fact finder is balanced with regard to whether or not there is reasonable doubt of the guilt of the accused. The presumption of innocence requires that such a level of proof is not sufficient for conviction, but rather requires that the State provide that additional proof which will establish guilt beyond a reasonable doubt. The State's instruction which shifts to the defendant the burden to "create" a reasonable doubt shifts this balance and destroys the presumption of innocence.

Moreover, and more importantly, the linguistic shifting of the burden from the State to the defendant has far more expansive impact upon the process of deliberations of the jury, than the somewhat theoretical discussion above would suggest. Furthermore, the likelihood that the instant instruction could mislead reasonable jurors in the proper allocation of the burden of persuasion was recognized by the

Fourth Circuit and was held to require the instruction's rejection:

> "Counsel for Adkins and the State have vigorously debated the quantum of prejudice resulting from saddling a defendant with the burden of creating a reasonable doubt in jurors' minds. We need not rest decision solely on so fine and abstract a point. Because the alibi instruction could mislead reasonable jurors in the proper allocation of the burden of persuasion, the confusion engendered is sufficient to warrant its rejection. See Sandstrom v. Montana, 442 U.S. 510, 516-518 (1979)." Adkins v. Bordenkircher, 674 F.2d 279, 282 (4th Cir. 1982).

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The Court of Appeals correctly decided the issues raised by petitioner's petition. Accordingly, for the reasons set forth above, respondent urges that petitioner's petition for Writ of Cetiorari be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the respondent, Jinks Adkins, Jr., by counsel and moves the Court for an order permitting him to proceed in this Court, in forma pauperis, on this action on petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit from a judgment of that Court entered March 24, 1982. Respondent so moves pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of the United States Supreme Court; the petitioner having moved for and been granted leave to proceed in forma pauperis, in this matter below before the United States District Court for the Southern District of West Virginia and before the United States Court of Appeals for the Fourth Circuit, and said District Court and Court of Appeals having appointed counsel under the Criminal Justice Act of 1964 to represent petitioner in said actions below.

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